IN RE OTTER SLIDE TIMBER SALE

IBLA 82-733 Decided August 31, 1983

Appeal from decision of the Roseburg, Oregon, District Office, Bureau of Land Management, denying protest of the Otter Slide Timber Sale. Tract No. 82-26.

Affirmed.

1. Timber Sales and Disposals

   A BLM decision to proceed with a proposed timber sale, when reached after consideration of all relevant factors and supported by the record, will not be disturbed absent a showing that the decision is clearly erroneous.

2. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales--Rules of Practice: Appeals: Generally--Timber Sales and Disposals

   A party challenging a decision to harvest timber on the grounds that allowable cut has been exceeded and that pertinent environmental considerations were disregarded bears the burden of establishing both the factual predicates and the ultimate conclusions.

APPEARANCES: Cheryl Kolander, Myrtle Creek, Oregon, for appellants; James E. Hart, district manager, Roseburg, Oregon, for Bureau of Land Management; James Arneson, Umpqua Valley Audubon Society, as intervenor; Denis Hayward, field forester, Northwest Timber Association, Eugene, Oregon, as intervenor; Mike Gerstenberger, Douglas Timber Operators, Inc., Roseburg, Oregon, as intervenor.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

North Myrtle Watershed Study Council has appealed a decision dated March 23, 1982, of the Roseburg, Oregon, District Office, Bureau of Land

Management (BLM), denying its protest of the Otter Slide Timber Sale (Tract No. 82-26). This tract was offered for sale at oral auction on March 23, 1982. BLM received a high bid of $194,172.25 from C & D Lumber Company.

The Study Council challenged the proposed timber sale on five major grounds:

1. BLM violated the O&C Act [Oregon and California Railroad and Coos Bay Wagon Road Grant Lands, 43 U.S.C. § 1181(a) (1976)]; [1/] Federal Regulations, and BLM Manual Provisions by selling for an unreasonably low price below the fair market value of the timber;

2. BLM exceeded the allowable cut for the South Umpqua Sustained Yield Unit;

3. BLM failed to implement mitigation measures required by the environmental assessment;

4. BLM failed to prepare an environmental assessment which adequately reviews alternatives, impacts, and public comments; and

5. BLM violated the NEPA [National Environmental Policy Act, 42 U.S.C. § 4321 (1976)] by making decisions prior to preparation of the environmental assessment.

The Umpqua Valley Audubon Society (Audubon) filed a motion to intervene which was granted by the Board. The Audubon statement in intervention addressed and supported the first issue presented by the Study Council.

Douglas Timber Operators, Inc. (DTO), filed a motion to intervene on its own behalf and on behalf of C & D Lumber Company and North West Timber Association. The motion was granted with respect to DTO but denied with respect to the other two parties, as DTO was not authorized to practice before the Board on behalf of the other parties. DTO subsequently filed a statement in response to the statement of reasons filed by the Study Council.

The Study Council statement of reasons presented arguments with respect to each ground in considerable detail. BLM filed a response directed to the points raised by the Study Council. Following the response a 58-page responsive statement was filed on behalf of the Study Council and a reply to the responsive statement was filed by BLM.

Each of the contentions is discussed in considerable detail by all parties. Appellant raised many issues and presented them in lengthy and detailed briefs. BLM filed substantial and specific responses to the points raised. Subsequently, appellant submitted a second pleading and asserts in

1/ For a concise discussion of forest production and timberlands management under the O&C Act see generally In Re Lick Gulch Timber Sale, 72 IBLA 261 (1983).

the opening paragraph that its original statement of reasons was adequate to counter BLM's answer. The second responsive pleading filed by BLM contains a similar assertion that appellant's challenges were adequately answered in BLM's first response.

[1, 2] The applicable standard of review in a case of this nature is that so long as BLM policy or implementing action is based on a consideration of all relevant factors and is supported by the record it will not be disturbed absent a clear showing that it is contrary to statute or regulation, or otherwise erroneous. In Re Lick Gulch Timber Sale, supra; Alan Winter, 62 IBLA 299 (1982).

We have reviewed the record and will discuss each of appellant's contentions in light of our review.

With respect to the value of the timber, BLM states that the timber appraisal value for Douglas fir was $10.65 per thousand board feet. Of a total estimated volume of 6,680 mbf, there was an estimated 4,952 mbf of Douglas fir. This value was increased to $20.40 per thousand board feet after considering the "pond value" (value of logs delivered to a mill). 2/ The accepted bid was $20.50 per thousand board feet. In an attempt to show that this figure did not constitute a fair market value, appellant made numerous assertions concerning, among other things, market analysis, economic climate, administration, and processing of BLM's timber sales appraisal. As a part of its response BLM submitted various tables illustrating historic United States lumber and plywood consumption over time, changes in price during consecutive business cycles, peaks and troughs in average quarterly bids, and business cycle expansions and contractions, among others. The BLM response stated:

> The 1982 annual average of dollars bid per thousand board feet over and above the appraised value per thousand board feet of $37/MBF is greater than nine of the last fifteen years. This premium of bid over appraised value for all advertised Roseburg District timber sales in March, the month of the Otter Slide timber sale was $19/MBF. This premium is greater than or equal to the premium received in 70 of the 175 months from September 1967 through June 1982.
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> Another method of evaluating the market's normality is by examining the ratio of bid to appraised price per thousand board feet. For the first six months of 1982, the Roseburg District received a bid of $1.90 for every $1.00 of appraised value in advertised timber sales. This ratio equals or exceeds the same for all years displayed in Table 8 (Attachment 5) except 1975, 1980 and 1981. In March 1982, the month of the appealed sale, the average for the District on all advertised sales was $1.50 in

2/ As noted by BLM, timber may not be offered for sale at less than 10 percent of pond value, which at the time of this sale was $204 per mbf.

> bid for every dollar of appraised value. This premium equals or exceeds the premium bid in 115 of the 178 months reported.

(Response at 10).

The BLM response then analyzed and explained the BLM's appraisal theory and method. BLM also responded to the host of ancillary challenges raised by appellant. Contentions with respect to soil expectation value, hydrology, and road maintenance were answered. We do not find it necessary to discuss each of these items in order to reach a dispositive result. The BLM responses demonstrate that appellant's challenges were in many cases based on incomplete information, on misperceptions of the process being challenged, or on both. Appellant did not show that the bid accepted by BLM was unreasonably low.

Appellant also asserts that allowable cut for the South Umpqua Master Unit was exceeded between 1972 and 1981. The BLM responses identified many areas in which the data on which appellant's challenge is based were erroneous and demonstrated that the figures relied on by appellant contained several minor accounting errors and several major posting errors. BLM gives the correct allowable data on pages 22 and 23 of its response. After a review of the data submitted by appellant and that used by BLM, we find that appellant's charge that the Otter Slide Timber Sale exceeds allowable cut is not supported by the record.

Appellant's third, fourth, and fifth contentions will be discussed together as they are directly related. First, BLM's responses state, and the file reflects that mitigating measures, as recommended by BLM resource specialists, are part and parcel of the timber sale. In a step by step narrative BLM demonstrated how it had identified environmental concerns, how mitigating measures were developed, and how these measures were integrated into management decisions. In doing so BLM has answered point by point, each of appellant's many charges. The responses contained detailed references to pertinent environmental documents. Appellant had the opportunity to participate in the public comment phase, after preparation of the draft environmental assessment. The record shows that impacts and alternatives were fully considered and evaluated at the environmental impact statement (EIS), aggregate environmental assessment, and individual sale levels. Appellant's claims to the contrary lack foundation. 3/ In addition, the environmental assessment was completed

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3/ Appellant's discussion concerning NEPA discloses a misinterpretation of the scope of the law. NEPA is not intended to prohibit actions which result in environmental degradation. Rather, its purpose is to insure that decision-makers are aware of the full range of consequences which may result from proposed activities. See James River Flood Control Ass'n v. Watt, 553 F. Supp. 1284, 1295 (D.S.D. 1982). As the Supreme Court has noted, "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to insure a fully informed and well-considered decision * * *." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978) (citations omitted). See also Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980). NEPA requires no more than that all environmental considerations have been explored. We are persuaded by the record herein that this was done.

after the receipt of review comments, public review, and prior to the decision. The record of decision was completed on January 12, 1982. The original decision was amended by the environmental supplement No. 4. A plan or proposal must exist prior in time before its impacts or consequences can be assessed, and mitigating measures developed. We can find no violation of the NEPA process.

Appellant's observations, recommendations, and critiques reflect many instances of disagreement with the viewpoints of BLM. 4/ They fall short, however, of showing that BLM's judgments are clearly erroneous, or contrary to applicable law or regulation. The Board has a general obligation to defer to BLM's expertise and to give it deference in actions based on its expertise taken pursuant to defined statutory authority where BLM's determinations are supportable. An appellant's judgment cannot be substituted for that of BLM on the basis of arguable differences of opinion. See In Re Lick Gulch Timber Sale, supra; Richard J. Leaumont, 54 IBLA 242, 88 I.D. 490 (1981); Oregon Wilderness Coalition, 71 IBLA 67 (1983).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

I concur:

James L. Burski
Administrative Judge

4/ In some instances, appellant has attempted to apply legal standards which are simply nonapplicable. Thus, both appellant and intervenor Audubon have argued that temperature elevation of the South Umpqua River would violate Oregon State water quality standards, citing chapter 340-41-285(2)(b)(A) of the Oregon Administrative Rules. As we noted in our decision in In Re Lick Gulch Timber Sale, supra, this provision applies only to point source discharges and is not applicable to timber harvesting. Id. at 299-301.

ADMINISTRATIVE JUDGE STUEBING, CONCURRING:

While in full accord with the rationale of the majority opinion, I wish to comment on the standing and capacity of appellants to litigate their principal issue; i.e., their contention that BLM sold the subject timber for an unreasonably low price. Appellants identify themselves as the "North Myrtle Watershed Study Council, Cheryl Kolander, et al." They assert only that they "are affected by the Otter Slide Timber Sale as residents of North Myrtle Canyon and as county taxpayers."

With regard to the environmental issues, I am willing to assume that either Kolander and/or (other) members of the North Myrtle Watershed Study Council has (or could) avoid the holding in Sierra Club v. Morton, 405 U.S. 727 (1972), that the "special interest" of a group in an environmental matter is insufficient to give that group standing. That is to say, I believe that they may assert that the Council is "an organization whose members are injured [and which, therefore] may represent those members in a proceeding for . . . review." 405 U.S. at 738-39.

Nevertheless, I continue to be troubled by the apparent lack of legal capacity of such informal organizations to bring actions such as this. The laws which create, identify and regulate business entities as "artificial persons" are directed, at least in part, toward endowing such artificial persons with the capacity to litigate as entities having cognizable legal rights. As stated in my dissent in Crooks Creek Commune, 10 IBLA 243, 255 (1973):

> First, I am concerned with the nature, or status, of the appellant. What manner of being is this that commands legal cognition? Is it a corporation, a trust, a partnership, a governmental body, or a person? How can it be recognized in law? Can it hold property, sue and be sued in its own name? What responsibility is owed it by the United States? It is formed, I gather, of its individual constituent members. Do they each own an individual undivided interest in the adjacent land? If so, why do they not appear before us in their individual capacities, rather than in the guise of a collective pseudonym? Insofar as the record reveals, the Crooks Creek Commune has no better standing at law than a chowder and marching society, or an amateur bowling league. Summary dismissal is merited on this basis alone.

Although I am not unaware that such legal nonentities as this have, from time to time, been allowed by the courts to litigate, I have never been able to comprehend why. If no person, real or artificial, can sue them, how can they enjoy the right to sue others?

Assuming, arguendo, that I am simply wrong in my conclusion that the North Myrtle Watershed Study Council lacks the legal capacity to bring this appeal, let us proceed to the question of its standing, and that of Cheryl Kolander "et al.", to appeal on the ground that BLM sold the subject timber for an unreasonably low price.

Status as a member of the general public, a citizen, and a taxpayer (none of which may be asserted by North Myrtle Watershed Study Council) has long been held to be insufficient to invoke appellate review where the issue presented relates merely to the general welfare and the indirect interest of the citizen taxpayer in the affairs of his government. Massachusettes v. Mellon, 262, U.S. 447 (1923). Abstract injury is not enough. It must be alleged that the appellant has sustained, or is immediately in danger of sustaining, some direct injury as the result of the official conduct. O'Shea v. Littleton, 414 U.S. 488, 494 (1973).

> [A taxpayer's] interest in the moneys of the Treasury-partly realized from taxation and partly from other sources - is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for appeal * * *.
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> [I]f one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned.

Massachusetts v. Melon, supra, at 487.

A more modern application of the rule is found in Society Hill Civic Association v. Harris, 632 F.2d 1045, 1059 (3rd Cir. 1980), which is directly in point, viz:

> The only interest that the Association can assert in this context is the taxpayer interest of its members, who may be concerned to ensure that the government does not lease or sell property at too low a price. Such an interest does not confer standing to sue. See Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct.597, 67 L.Ed. 1078 (1923).

Admittedly, this rule of standing is essentially a judicial rule, and it might be argued that an administrative agency should be more lenient in allowing access to its appellate process. Yet, the reasons for the rule are equally compelling in the administrative process. "Taxpayer" appeals in this Department alone could challange a wide variety of transactions on the contention that the Government accepted insufficient remuneration, including, inter alia, rights-of-way, ground leases, land sales, mineral leases let by competitive bidding, trespass settlements, royalty computations, user fees for special use permits, etc. When extended to include all the other agencies of Government, the potential list of reviewable "taxpayer" appeals would become infinite; e.g., that the General Services Administration is selling surplus jeeps too cheaply, or that the Customs Service is not getting enough from sales of seized contraband.

Although O. and C. land timber sale revenues are shared with the county in which these appellants are resident taxpayers (except the North Myrtle

Watershed Study Council), this does not exempt them from the rule. For comparison, the State of Alaska receives 90 percent of Federal oil and gas revenues derived from leasing in that State, a far greater per-capita amount than we are concerned with here. Yet I believe this Board would be extremely reluctant to concede the right of any citizen/taxpayer in Alaska to appeal a lease sale or a royalty computation on the issue of insufficient remuneration.

Therefore, although I concur in the result reached by the majority, I would have preferred a procedural dismissal of the economic issue.

Finally, I wish to acknowledge the superlative professional quality of appellants' brief and the response by BLM. It has rarely been my privilege to encounter such masterful presentations by both sides in a single case.

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Edward W. Stuebing
Administrative Judge